

No. 46357-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Justin Moses,

Appellant.

Pierce County Superior Court Cause No. 12-1-03277-9

The Honorable Judge Stephanie Arend

Appellant's Supplemental Brief

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SUPPLEMENTAL ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court erred by imposing an exceptional sentence.
2. The trial court erred by instructing jurors on the ‘abuse of trust’ aggravator.
3. The “abuse of trust” aggravating factor applies only to crimes with a *mens rea* of intent, not recklessness.
4. The “abuse of trust” aggravating factor inheres in criminal mistreatment.

ISSUE 1: A sentencing court exceeds its authority by imposing an exceptional sentence based on inapplicable aggravating factors. In this case, the court based its exceptional sentence in part on the abuse of trust aggravating factor, which does not apply to criminal mistreatment. Must the exceptional sentence be vacated and the case remanded for a new sentencing hearing?

ISSUE 2: An exceptional sentence may not be based on an aggravating factor that inheres in the crime charged. Here, the sentencing court based its exceptional sentence for second-degree criminal mistreatment in part on the “abuse of trust” aggravating factor. Did the sentencing judge erroneously base the exceptional sentence on a factor that inheres in second-degree criminal mistreatment?

5. The trial court erred by instructing jurors on the ‘vulnerable victim’ aggravator.
6. The evidence was insufficient as a matter of law to prove that M.A. was particularly vulnerable.

ISSUE 3: An aggravating factor must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found all of the elements beyond a reasonable doubt. Here, there was no evidence that M.A. was particularly vulnerable compared to other victims of criminal mistreatment. Did the court err by instructing jurors on the ‘particularly vulnerable’ aggravating

factor and by imposing an exceptional sentence based in part on that aggravator?

SUPPLEMENTAL FACTS

A jury convicted Justin Moses of second-degree criminal mistreatment for withholding food from five-year-old M.A. CP 290, 294-307. Prior to coming to the Moses household, M.A. had developed an eating disorder. He was at risk of developing diabetes, he overate to the point of illness, and he even tried to eat garbage and other non-food items such as lotion and chicken bones. RP (4/25/14) 631, 666-667, 678-681; RP (5/5/14) 1213-1216; RP (5/6/14) 1318.

The trial court instructed jurors on the ‘abuse of trust’ and ‘vulnerable victim’ aggravating factors:

A victim is “particularly vulnerable” if he or she is more vulnerable to the commission of the crime than the typical victim of criminal mistreatment in the second degree, The victim’s vulnerability must also be a substantial factor in the commission of the crime.
CP 274.

A defendant uses a position of trust to facilitate a crime when the defendant gains access to the victim of the offense because of the trust relationship. A defendant need not personally be present during the commission of the crime, if the defendant used a position of trust to facilitate the commission of the crime by others.

In determining where there was a position of trust, you should consider the length of the relationship between the defendant and the victim, the nature of the defendant’s relationship to the victim, and the vulnerability of the victim because of age or other circumstance.

There need not be a personal relationship of trust between the defendant the victim. It is sufficient if a relationship of trust existed between the defendant and someone who entrusted the victim to the defendant’s care.

CP 275.

The jury returned special verdicts endorsing each aggravating factor. CP 288, 289. The sentencing judge imposed an exceptional sentence of 40 months. CP 294-307, 318-322. Mr. Moses timely appealed. CP 328.

ARGUMENT

I. THE “ABUSE OF TRUST” AGGRAVATING FACTOR DOES NOT APPLY TO CRIMINAL MISTREATMENT.

A. The “abuse of trust” aggravating factor inheres in criminal mistreatment.

A sentencing court may impose an exceptional sentence above the standard range if there are “substantial and compelling reasons” justifying the sentence. RCW 9.94A.535. The court exceeds its authority when it imposes an exceptional sentence for reasons that are not substantial or compelling. *State v. Ferguson*, 142 Wn.2d 631, 649, 15 P.3d 1271 (2001).

Any factor inherent in the crime cannot justify an exceptional sentence. *Id.*, at 647-648. A factor inheres in the crime if it was necessarily considered by the legislature in establishing the standard range for the offense. *Id.* Thus, for example,

conviction of the offense of exposing another person to HIV with intent to do bodily harm leaves no room for an additional finding of deliberate cruelty as justification for an exceptional sentence. A finding by the trial court that Petitioner's act constituted deliberate cruelty cannot be used to elevate the sentence to an aggravated

exceptional sentence because intent to do bodily harm is an element of the offense charged under former RCW 9A.36.021(1)(e), and was already considered by the Legislature in establishing the standard sentence range.

Id., at 648. See also *State v. Stubbs*, 170 Wn.2d 117, 127-149, 240 P.3d 143 (2010) (severity of injury already considered by legislature in setting the standard range for first-degree assault); *State v. E.A.J.*, 116 Wn. App. 777, 789, 67 P.3d 518 (2003) (injuries caused by choking inhere in second-degree assault and cannot support manifest injustice disposition.)

Second-degree criminal mistreatment may only be committed by “[a] parent of a child, the person entrusted with the physical custody of a child or dependent person, a person who has assumed the responsibility to provide to a dependent person the basic necessities of life, or a person employed to provide to the child or dependent person the basic necessities of life.” RCW 9A.42.030. Such persons necessarily occupy a position of trust; accordingly, all persons who may be convicted of criminal mistreatment have abused the trust placed in them.¹ Because of this, the legislature necessarily considered “abuse of trust” in setting the standard range for the offense, and the aggravator cannot be used to justify an exceptional sentence in this case. *Ferguson*, 142 Wn.2d at 648-649.

¹ As noted above, however, RCW 9A.42.030(3)(n) applies only to purposeful misconduct, and cannot aggravate a crime committed with the mental state of recklessness. *Hylton*, 154 Wn. App. at 953.

- B. The “abuse of trust” aggravating factor does not apply to crimes involving recklessness.

An exceptional sentence may be imposed if “[t]he defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.” RCW 9.94A.535(3)(n). Under the statute, “the factor applies only to purposeful misconduct.” *State v. Hylton*, 154 Wn. App. 945, 953, 226 P.3d 246 (2010).² It does not apply to conduct that is merely reckless. *Id.*

Mr. Moses was convicted of a crime involving reckless conduct. The “abuse of trust” aggravating factor could not lawfully be applied to him. *Id.* His exceptional sentence cannot stand. The sentence must be vacated and the case remanded for sentencing within the standard range. *Id.*

II. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THAT M.A. WAS PARTICULARLY VULNERABLE.

The facts supporting an aggravating factor must be proved to a jury beyond a reasonable doubt. RCW 9.94A.537(3); *Blakely v. Washington*, 542 U.S. 296, 301, 124 S.Ct. 2531, 2536, 159 L.Ed.2d 403 (2004). Courts evaluate evidence establishing an aggravating factor using the same

² Prior to the “*Blakely* fix” legislation (Laws of 2005, ch. 68), a nonexclusive list of aggravating factors permitted imposition of an exceptional sentence for reckless conduct by analogy to the codified aggravating factor. *Hylton*, 154 Wn. App. at 953 (citing *State v. Chadderton*, 119 Wn.2d 390, 398, 832 P.2d 481 (1992)).

standard used to evaluate sufficiency of the evidence of a substantive crime. *State v. Zigan*, 166 Wn. App. 597, 601, 270 P.3d 625 (2012).

A claim of insufficient evidence admits the truth of the state's evidence and all reasonable inferences therefrom. *State v. Caton*, 174 Wn.2d 239, 241, 273 P.3d 980 (2012). A conviction must be overturned for insufficient evidence if no rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *State v. Drake*, 149 Wn. App. 88, 93, 201 P.3d 1093 (2009).

A finding of particular vulnerability can be based on the victim's disability or extreme youth. *See, e.g., State v. Berube*, 150 Wn.2d 498, 79 P.3d 1144 (2003); *State v. Suleiman*, 158 Wn.2d 280, 288, 143 P.3d 795 (2006) (citing former RCW 9.94A.535 (2003)). The prosecution must also prove that the victim's particular vulnerability was a substantial factor in the commission of the crime. CP 274.

Here, the state failed to prove that M.A. was particularly vulnerable. First, this case does not involve extreme youth. M.A. was five years old. This contrasts to other cases in which the child victim's extreme youth created particular vulnerability. *Cf. State v. Jennings*, 106 Wn. App. 532, 24 P.3d 430 (2001) (assault of 13-day-old child); *Berube*, 150 Wn.2d at 513 (homicide by abuse of two-year-old child); *State v.*

Jones, 59 Wn. App. 744, 801 P.2d 263 (1990) (manslaughter involving four-month-old child).

Second, although M.A. was arguably disabled, his disability did not make him particularly vulnerable. Indeed, the difficulties posed by M.A.'s eating problems arguably mitigated the offense, in that Ms. Moses's attempts to limit M.A.'s food intake were initially motivated by legitimate concern for his well-being.

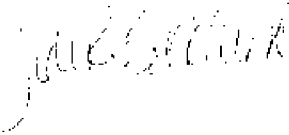
For these reasons, the evidence was insufficient to prove that M.A. was particularly vulnerable. *Drake*, 149 Wn. App. at 93. The trial court should not have instructed the jury on the 'vulnerable victim' aggravating factor, and should not have imposed an exceptional sentence. The sentence must be vacated and the case remanded for sentencing within the standard range. *Id.*

CONCLUSION

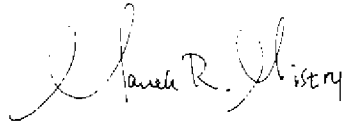
If Mr. Moses's conviction is upheld, the exceptional sentence must be vacated and the case remanded for sentencing within the standard range. If the case is retried, the jury should not consider the 'abuse of trust' or 'vulnerable victim' aggravating factors.

Respectfully submitted on January 14, 2015,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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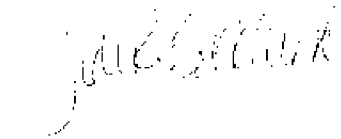
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I filed the Appellant's Supplemental Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 14, 2015.



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BACKLUND & MISTRY

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